Michael K. Jeanes, Clerk of Court
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09/09/2008 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-003187 09/04/2008

HON. ANDREW G. KLEIN

CLERK OF THE COURT
L. McNamara
Deputy

SANDRA J HOPE

WILLIAM W DRURY JR.

v.

MARK D BRANNON, et al.

FREDERICK M CUMMINGS

SUSAN I MCLELLAN
PATRICK D WHITE

MINUTE ENTRY

9:01 a.m. This is the time set for Oral Argument Regarding Defendant's Motion to Dismiss for Failure to Comply and Defendant's Motion for Summary Judgment.

Plaintiff Sandra J. Hope is present and represented by Jack Klecan. Defendant, Dr. Dellios, is represented by James Bennett, Michael Steinberg is represented by Dee Gile, and Mark D. Brannon, et al. is represented by David Williams.

FTR

Oral argument is heard.

IT IS ORDERED a minute entry will be issued addressing the above motions.

9:38 a.m. matter concludes

LATER

The court has received and reviewed Defendant's Motion to Dismiss for Failure to Comply with A.R.S.§ 12-2603, Defendants' Joinders in that Motion, Plaintiff's Response in Opposition to the Motion to Dismiss, Defendants' Reply in Support of their Motion to Dismiss, and Defendants Dellios' Motion to Dismiss 150 Day Order. The court has also considered the arguments raised at the hearing on September 4, 2008.

A.R.S. §12-2603(B) requires Plaintiff in a dental or medical malpractice action to file a preliminary expert Affidavit to support her standard of care position. In this case, the expert who prepared the Affidavit -- Dr. Joseph Dovgan -- is a general dentist, not a medical doctor, even though the complaint alleges a myriad of serious medical problems stemming from dental negligence. 12-2603(B) further provides that the Affidavit must contain information regarding the manner in which the health care professional's acts, errors, or omissions caused or contributed to the damages or other relief sought by the claimant.

Dr. Dovgan's Affidavit does not provide an opinion on causation. Moreover, even if Dr. Dovgan's Affidavit is amended to assert some causation opinions, that still would be insufficient because Dr. Dovgan is a general dentist, not a medical doctor. A.R.S. §12-2603(B) requires the expert to be qualified to render opinions on causation, and in the court's judgment that should mean expert testimony from a medical doctor. The damages alleged in this case include a host of medical issues supposedly stemming from a tooth infection, and these include urinary tract infections, intestinal cystitis, renal failure, pancreatitis, facial cysts, heart palpitations, and other systemic problems. Dentists typically don't treat those problems, nor are they trained to diagnose them.

While case law suggests that it's not necessary that an expert witness be a medical doctor in order to offer testimony regarding the causation of physical injuries, the court first must properly determine that the expert has specialized knowledge that will assist the trier of fact in its resolution of the issue. See Arizona Rule of Evidence 702. Thus, the question is whether a general dentist has specialized knowledge on how an infection originating in a tooth could cause rampant systemic problems over 8 years that involve many internal organs and a host of medical symptoms. In the court's judgment, Dr. Dovgan, being a general dentist, does not possess such specialized knowledge. A.R.S. §12-2603(C) does, however, allow the court to extend the time Plaintiff has to comply with the statute. To that end, the court is extending to November 1, 2008 the deadline to allow Plaintiff to file a new or amended preliminary expert Affidavit. As indicated, an expert medical opinion will be required to establish proximate cause.

The Motion to Dismiss 150 Day Order is granted as this is a dental malpractice case with scheduling governed by different time constraints. See Arizona Rule of Civil Procedure 16(C).

The Court is in receipt of Defendants' Motion for Summary Judgement, other Defendants' Joinders in that motion, Defendants' Statement of Facts in Support of the Motion for Summary Judgment and other Defendant's Joinders, Plaintiff's Response in Opposition to the Motion for Summary Judgment, Plaintiff's Separate Statement of Facts and Contraverting Statement of Facts, Defendant's Response to Plaintiff's Separate Statement of Facts, and Defendant's Reply in Support of Motion for Summary Judgment. The Court has also considered the arguments raised at the hearing on Sept 4, 2008.

As the facts of this case are detailed, it is not the court's intent to discuss them at length. For purposes of ruling on the Motion for Summary Judgment, the Court summarizes the salent facts as follows:

* On May12, 1994, Dr. Brannon placed and seated a permanent crown on tooth #8.

* On August 29, 1996, Dr Brannon first treated tooth #31. Plaintiff would have additional treatment related to tooth #31 over the next year, eventually leading to seating a permanent crown on that tooth.

* At various times beginning in 1997 and extending for several years, Plaintiff experienced problems with tooth #8 that required additional treatments, none of which appeared to have remedied the problem. This caused the Plaintiff to contemplate filing a claim against Dr. Brannon with the Arizona Board of Dental Examiners related to the problems she'd experienced with tooth #8.

* On December 31, 2001, Dr. Brannon agreed to refund Plaintiff the exact cost he charged her in 1994 ($651.50) to seat the crown on tooth #8. In return, Plaintiff had to withdraw her administrative claim against Dr. Brannon and sign an all-encompassing release.

* At the time Plaintiff and Defendant Brannon entered into the Release Agreement, she already had experienced many of the symptoms she now alleges in her Complaint. However, she contends that she had no idea that any of those medical problems were related to negligent treatment by Dr. Brannon and specifically to the services he rendered as to tooth #31. Plaintiff claims that the Release was specifically confined to Dr. Brannon's treatment of tooth #8 and did not cover tooth #31. Thus, she states that when she signed the Release for tooth #8, she did not know that the risks and injuries afflicting her were a result of Dr. Brannon's negligence for tooth #31 so she did not realize that by signing the Release she would be discharging Dr. Brannon's liability for tooth #31.

Defendants contend that all of Plaintiff's claims are barred by the release of liability she signed. The release language contemplates that Plaintiff was releasing Dr. Brannon from all claims, whether known at the time or not, arising out of any dental

treatment ever rendered by Dr. Brannon. Plaintiff further acknowledged understanding all terms in the Agreement, that the Agreement contained the entire understanding between the parties, that she voluntarily accepted these conditions, and that she knew she was giving up any future claims which she did not know existed but if she had would have materially affected her decision to sign the Release. In short, Defendants contend that the Release Agreement is clear and unambiguous and covers the very claims that Plaintiff is now alleging against Dr. Brannon. As a result, Defendants urge the court to give effect to the contract as written and bar her claims for dental treatment and services provided by Dr. Brannon.

The court agrees with Defendants that there was equal bargaining power between the parties as the contract terms are clear and unambiguous, Plaintiff voluntarily chose to enter into the Agreement, and no one forced her to sign the release. This was also a bargained for exchange as Plaintiff received a refund for her dental treatment in exchange for signing a release. Additionally, this Release doesn't violate public policy as it's a settlement in regards to a pre-existing injury as opposed to involving a pre-negligence exculpatory clause.

Although the court finds the release to be clear and unambiguous, there are material issues of genuine fact that at this time preclude dismissal of Plaintiff's Complaint as a matter of law. Plaintiff assets that the release she signed was intended to cover claims relating only to tooth #8. The refund was for the exact cost of the tooth #8 crown, the administrative complaint she agreed to withdraw was related to tooth #8 and according to Plaintiff, Dr. Brannon's front office employee told her that the release was specifically confined to Dr. Brannon's treatment of tooth #8.

Further, at the time the release was given, there was no discussion of tooth #31, which involved different treatment and services rendered on different dates. In fact, at the time the release was given, Plaintiff believed that Dr. Brannon had treated her inappropriately only in regards to tooth #8 but had no inkling that there were any problems regarding tooth #31 or that negligence related to tooth #31 was the cause of her symptoms. She claims that she did not even learn of the alleged causal connection between Dr. Brannon's treatment of tooth #31 and her medical problems until March, 2006, some 4 ½ years later. Based upon the forgoing, Plaintiff claims she would not have signed the release if she was aware of Dr. Brannon's negligent treatment concerning tooth #31.

The Plaintiff's intent, what was contemplated by the parties, and the circumstances surrounding the signing of the release are issues of fact that, despite the language of the release, bear on whether there was bargained for consideration. If, as Plaintiff believed, the release was only intended to apply to tooth #8, then there was no

consideration releasing Dr. Brannon from liability for tooth #31. Accordingly, there is a genuine issue of material fact regarding whether Plaintiff intended to waive a claim of right regarding tooth #31, and Defendants' Motions for Summary Judgment on this issue at this time are denied.

Plaintiff's Reguest for fees under Rule 11 or A.R.S. § 12-341.01 is denied.